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MILITARY JUSTICE

by

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In 1886 Colonel William Winthrop, a recognized authority on military justice described the rules and procedure which identify this area of the law as a "code of greater age and dignity and of a more elevated tone than any existing American Code."¹ In spite of the lofty phraseology used in this definition of the rules which govern the maintenance of justice, order and discipline within the nation's armed forces, this branch of the law has, for many years, been neglected by students of law and practitioners at the bar. Except for those who have had military training or experience most members of the legal profession are uninformed on the body of law which is the basis for the military judicial system.

In recent years, and particularly since World War II, military justice has taken on new meaning and importance. Due to that war and the present existence of continuing crises, identified by cold wars, police actions, conscription of civilians, and international unrest, what was once an isolated and specialized field of the law, applicable to only a few, has expanded to a matter of importance to many. "Military justice is the largest single system of criminal justice in the nation, not only in time of war, but also in time of peace; now, and as far ahead as we can see."²

The percentage of the total crime problem handled by the judicial procedures of the military forces of this country is surprising. It has been estimated that at the height of World War II mobilization, the armed forces handled one-third of the nation's crime potential; that courts-martial handled one-third of all criminal cases involving United States nationals; and that the remaining two-thirds was divided among forty-nine civilian systems, those of the forty-eight states and the Federal government. An application of those percentages to the present relative strength and composition of the armed forces reveals that in September 1952 the armed forces handled one-ninth of the nation's crime potential and that courts-martial handled one-ninth of all criminal cases involving United States nationals.³ Presently, according to the best available statistics courts-martial, during an eighteen month period, will handle approximately 400,000 cases.

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¹ Preface to the First Edition, Winthrop's *Military Law and Precedents*.

² Karlen and Pepper, *The Scope of Military Justice*, 43 *The Journal of Criminal Law* (Sept.-Oct., 1952).

³ *ibid.*

Moreover, the jurisdiction of military justice extends to persons assigned to, serving with, or accompanying the armed forces without the continental limits of the United States and certain of its territories; prisoners of war in custody of the armed forces; and, subject to any treaty agreement or accepted rule of international law, all persons within areas leased, reserved or acquired for the use of the United States which are outside the continental limits of this country and certain of its territories.⁴

When consideration is given to the wide scope of the jurisdiction of military courts and the number of American citizens involved, it is apparent that if the important factors of morale and discipline are to be maintained in the armed forces the fundamental principles upon which American justice is based must be recognized and protected. Those forces are now, and will continue in the future to be, composed of persons whose daily experience in the civilian community of this nation has taught them to demand the protection afforded them by their state and Federal constitutions and statutes. The continued protection of these rights in the military community, in so far as is compatible with disciplinary necessities is essential to the preservation of a military code of justice. This Congress attempted to do by enacting the Uniform Code of Military Justice.

It has been stated that "it's difficult to imbue men with the spirit to fight to preserve the American way of life, when the basis of that way of life is justice, if the men who are expected to fight are denied any of the fundamentals of that justice."⁵ All well-informed members of the armed forces recognize the need for rules and regulations to govern their conduct, and most believe those enacted should be enforced. An army is no different than society itself as it cannot succeed unless it has some means or methods for punishing those who fail to live according to its code. As a matter of fact when one is daily facing death in combat his fear of punishment for violations of the rules is not nearly so great as it is when he is living in the peace, safety and comfort of his home. The conclusion, therefore, is inescapable that in these days of continued international emergencies, when a large armed force is required to protect our national interests, this long-neglected area of justice requires and deserves the attention of all members of the profession.

In the past the court-martial system has been the subject of much criticism. After each war the system was denounced by many who claimed familiarity with its abuses. Much of this was deserved and it focused the attention of Congress on the deficiencies. Improvements in the Articles of War were accomplished but when the emergencies terminated the great

⁴ Article 2, Uniform Code of Military Justice, 50 U.S.C. § 552.

⁵ Chester Ward, Captain, USN, *UCMJ—Does it Work?* 6 Vand. L. Rev. 186, 192 (February, 1953).

bulk of those who had been touched by the system forgot about its existence. This is understandable when consideration is given to the fact that the system no longer governed the daily life and habits of many after World War II. The Uniform Code of Military Justice was passed but its scope and beneficent provisions are practically unknown to the citizenry. This, too, is understandable because most of the serious offenses occur in far away lands and it is only through immediate relationship to an offender that the ordinary citizen is reminded of the existence of military law. For the most part the personal interest of those residing in a particular community, city, county or state is absent. They care little about a military offense in Korea, and what is more distressing there is a tendency on the part of some to assist their relatives and close friends in escaping the obligation to serve. I have recently been informed by responsible members of the military forces that parents have congratulated their sons on being astute in avoiding combat by going absent immediately prior to the departure on their overseas shipment. Obviously, public sentiment against a limited war carries over to those required to serve and this feeling makes it more difficult to engender public interest in learning about the merits of the present military code. I believe, however, that if any student of the law will familiarize himself with its provisions to the same extent he does with a civilian criminal code, the justice embraced within the military will not suffer by comparison. I hope before the article is finished to establish a substantial predicate for that statement.

Prior to May 31, 1951, the major branches of the armed forces were governed by separate and distinct Codes and the respective judicial systems had little similarity. The Navy was governed by the Articles for the Government of the Navy; and members of the Army and Air Force, after the latter became a separate and distinct branch, were governed by Articles of War. In 1950, to improve the administration of military justice and to unify the then existing Articles of War, the Articles for the Government of the Navy and the disciplinary laws of the Coast Guard, the Congress of the United States enacted the Uniform Code of Military Justice, designed to govern all departments of the armed forces. The punitive articles defined, the substantive rights granted, and procedural rules set out in that Code are the basis for present-day military justice. That law which surpasses, in its extension of rights and privileges to an accused, any previously enacted code or statute should be of sufficient interest and importance to justify close and critical scrutiny by the public generally and especially by members of the legal profession or those who aspire to follow that calling. To relate briefly some of the reforms may tend to establish the truth of the assertion that enactment of the new code was the commencement of a new era in the annals of military law.

The act of Congress which brought the new procedure into existence was passed on May 5, 1950, and became effective on May 31, 1951. I shall not go into great detail on the specific provisions of the act, neither shall I suggest my views on any of the present controversial sections. Time and experience will better furnish me with a reason for suggesting corrections to any found wanting. However, I desire to emphasize those reforms contained in the statute which I believe revolutionize justice as it used to be known in the Army and Navy.

First, there has been a standardization of the Army, Air Force and Navy courts-martial proceedings. The Articles of War and the Articles for the Government of the Navy were based upon laws adopted early in the history of this country. From their inception, they were influenced by the customs of the service and consequently reflected marked differences. Congress has done a remarkable job in reducing the areas of conflict and, with the exception of a few relatively unimportant details, brought about by peculiarities of the services, the Act applies equally to the Army, Navy, Air Force, and the Coast Guard.

Second, a civilian court of last resort was created and it is made readily available to every member of the armed forces without cost. While, prior to the creation of the Court, certain appellate procedures were available to an accused, it should be borne in mind that the boards of review and judicial councils, the previous appellate tribunals, were directly under the control of the respective departments. The appellate procedure previously provided did not afford the accused the right to have his case passed on by civilians, uninfluenced by membership in the service. While I do not suggest military control was used to influence any decision, I must take cognizance of the fact that the public seemed to hold that belief and demanded that some forum, free from direction, be created to review the record.

Another provision which I should mention deals with the change from the old law member method of operation to the new law officer concept. Under the new Code the law officer acts in a somewhat similar capacity to a judge in a civilian court. He must be a member of a bar of a Federal court or the highest court of a state of the United States, and must be certified to be qualified by The Judge Advocate General of the armed force of which he is a member. He rules upon interlocutory questions, other than challenge of a member. He must instruct the jury (court-martial) on the elements of the offense with which accused is charged, presumptions of innocence, reasonable doubt and burden of proof. He is not a member of the court for the purpose of voting and does not participate in voting on the findings or the sentence. He is precluded from con-

sulting with the members of the court, except in the presence of the accused, trial counsel and defense counsel. He thus can no longer use his legal training to convince the members of the court that he has "the approved solution."

Some of the other substantial reforms might be disclosed by coursing a case through the courts-martial system under the present act. This is the procedure with respect to an accused tried by a general court-martial and it portrays the similarity between the military and civilian systems. One charged with a crime is entitled to a pre-trial investigation which is the military counterpart of a preliminary hearing. He must be advised as to the charges against him and as to his right to have counsel present during the preliminary stages. If he is suspected of a crime, before he can be interrogated he must be informed that he has the following rights: That he need not make a statement regarding the offense; that he need not make any statement which tends to incriminate him; that any statement he makes may be used against him; and that he need not answer immaterial or degrading questions. This is an extension of the civilian rule that a person shall not be required to incriminate himself.

If the investigation discloses that an offense has probably been committed the charges are referred to a staff judge advocate for his advice and consideration. Thereafter, if the convening authority concludes that the charge alleges an offense and prosecution is warranted by the evidence indicated in the report, he may refer the matter to a general court-martial. This procedure parallels closely a finding by a committing magistrate that there is reasonable ground to believe an offense has been committed and that the defendant should be held for trial in a court of general jurisdiction.

Assuming a not guilty plea is entered the cause is then tried and the accused must be represented by counsel with the following qualifications: "A judge advocate of the Army or the Air Force, or a law specialist of the Navy or Coast Guard, who is a graduate of an accredited law school or is a member of the bar of a Federal Court or of the highest court of a State; or, shall be a person who is a member of the bar of a Federal court or of the highest court of a state; and shall be certified as competent to perform such duties by The Judge Advocate General of the Armed Force of which he is a member."⁶

The accused has certain safeguards thrown around him during trial. He is entitled to challenge any member for cause and one peremptorily. He cannot be convicted of an offense which carries a mandatory death

⁶ Article 27(b), Uniform Code of Military Justice.

sentence, except by the concurrence of all members of the court; and in other cases, two-thirds of the members must agree before a finding of guilty can be returned. In connection with a sentence he cannot be sentenced to death, except by the concurrence of all members. Sentences of ten years or more require concurrence of three-fourths of the members, while those involving less than ten years require two-thirds concurrence of the members.

The findings of the court-martial must be approved by the reviewing authority, who has the power to approve only such findings of guilty and sentence as he finds correct, in law and fact, and as he in his discretion determines should be approved. He may, if he concludes the accused was denied substantial justice or that prejudicial error crept into the record, grant a rehearing. Furthermore, he may dismiss the entire proceedings. In a sense he reviews the record in a manner somewhat analogous to a civilian judge considering a motion for new trial.

Unless the convening authority takes some action doing away with the necessity of an appeal, the entire record is then forwarded to The Judge Advocate General of the appropriate service, who is required to organize boards of review which function as intermediate appellate courts and which must be manned by not less than three officers or civilians, who are required to be members of the bar of a Federal Court or the highest court of a state. The Judge Advocate General must refer to a board of review every case involving a sentence which, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more. The board of review has authority to weigh the evidence, judge the credibility of the witnesses, determine controverted questions of fact, and affirm only such findings of fact and the sentence, or such part thereof, as it finds correct in law and fact. The next step is a petition to the United States Court of Military Appeals. In this petition, except in mandatory cases, the accused must state what he believes to be substantial error. A short brief, including a memorandum of authorities is to accompany this petition. The entire record is forwarded to the Court and each judge reviews the record to determine whether or not good cause has been shown for granting a review. If it is determined that no error has been committed, the petition is denied. On the contrary, if there appears to be any error affecting the accused's substantial rights, the petition is granted and the points in issue are subsequently argued on their merits.

The accused can take advantage of the procedure herein outlined without cost to himself. The Government must furnish counsel if desired before the officer conducting the pre-trial examination. It must furnish

counsel before the court-martial and the board of review. In addition, at the request of the accused it must furnish him appellate counsel for presenting the matter to the United States Court of Military Appeals. Accused has the right to employ civilian counsel at any stage of the proceeding and this is the only time when he is required to expend any money in his own behalf. All services are free, so there is no reason why any accused, if he believes he had been unjustly convicted, should not have an opportunity to present his cause to this Court. The Code provides that he must be notified of his right to appeal from an adverse decision by a board of review, so there is no longer any reason why anyone in the armed services, or their relatives and friends, should complain that they have not been informed of and afforded a reasonable and adequate mode of review. To establish the fact that in the eighteen months period of time the United States Court of Military Appeals has been in operation, many offenders have taken advantage of their rights to appeal, I quote a few informative figures: The Court has docketed a total of 2631 cases. Of these, 2520 were petitions filed by the accused for review, 120 were certificates filed by The Judge Advocates General of the different services, and 13 came by way of mandatory review, that is, they involved the death penalty or a flag or general officer.⁷ Of the petitions received 283 were granted by the Court, 1980 denied, 33 were withdrawn, and 214 are now pending, either awaiting final briefs or action by the Court. The Court has heard 304 cases argued, has handed down 248 opinions,⁸ has 91 opinions pending and 21 cases on the docket awaiting argument.

By having outlined generally the importance of the military judicial system and having shown how it parallels closely the civilian system, I hope I have created a belief on the part of those who read this article that participation in the military system is worthwhile. A lawyer admitted to practice should not encounter serious difficulty in becoming an expert in the military field. While it will require study and application to duty the problems encountered in defending those accused of committing offenses contrary to military law are no different than they are in the civilian practice. The principal requirements are knowledge of the Code and thorough preparation of the case.

In concluding this article I should like to point out that over the years the military judicial system has been the subject of a bitter controversy. When the Uniform Code of Military Justice of 5 May 1950 was presented to Congress for consideration, the Committee believed it had prepared a bill which would reduce the areas of conflict. Secretary of

⁷ The discrepancies in the figures caused by those cases which are docketed as both certificate and petition.

⁸ Some opinions were written on cases submitted without oral argument.

Defense James Forrestal, in testifying before the Armed Services Committee of the House, made the following statement:

Another problem faced by the committee was to devise a code which would insure the maximum amount of justice within the framework of a military organization. We are all aware of the number of criticisms which have been levelled against the court-martial system over the years.

I do not believe it is as bad as it has been painted, nor as good as some of its defenders claim. Many of the criticisms have seemed to me to be without foundation, but many of them have seemed to me to be justified.

The point of proper accommodation between the meting out of justice and the performance of military operations—which involved not only the fighting, but also the winning of wars—is one which no one has discovered.

I do not know of any expert on the subject—military or civilian—who can be said to have the perfect solution. Suffice it to say, we are striving for maximum military performance and maximum justice. I believe the proposed code is the nearest approach to those ideals.

The fight will continue but regardless of the conflict I solicit for the Court suggestions from the bar which will assist us in striking a proper balance which will permit maximum military performance and yet assure maximum military justice.

Presently there are 1025 attorneys admitted to practice in this Court, of which number 688 are members of the military forces and 337 are civilians. Those who are admitted to practice can help improve the system by participating actively in the proceedings at all levels. The better a case is tried in a trial forum the better it is decided on appeal. Excellent presentations to appellate courts result in better opinions from those tribunals. The bench and bar have a tendency to reach the same level and if we are confronted with a high standard of representation, we should have little excuse, in spite of the present volume of work, to produce an inferior product. For the reader who has not been admitted, I suggest you not only learn your civil law well but that you spend some time in learning a working knowledge of military law. If you do, and at some later date you take an active interest in the military bar, you will perform a beneficial public service.